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Supreme Court, U.S.
FILED
JUN 23 2005
OFFICE OF THE CLERK

No. 04-1333

IN THE

Supreme Court of the United States

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; BFI WASTE SYSTEMS OF NORTH AMERICA, INC.; BFI WASTE SYSTEMS OF MISSISSIPPI, LLC; AND WASTE MANAGEMENT OF MISSISSIPPI, INC.,

Petitioners,

v.

PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY AND ITS BOARD OF COMMISSIONERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

SUMMARY OF THE ARGUMENT 1

STATEMENT OF THE FACTS AND PROCEEDINGS BELOW 3

REASONS FOR DENYING THE PETITION 6

I. THE COURT OF APPEALS PROPERLY EXAMINED THE STANDING OF THE PLAINTIFFS BEFORE REACHING THE MERITS OF THE DISCRIMINATION CLAIM 6

II. THE FIFTH CIRCUIT'S APPLICATION OF THE PIKE BALANCE PROPERLY SEARCHED FOR DISPARATE IMPACTS ON IN-STATE AND OUT-OF-STATE INTERESTS 13

III. THE CONSTITUTIONAL ISSUES SUGGESTED BY THE PETITION ARE RAISED IN AN ABSTRACT CONTEXT UNRELATED TO THE FACTS OF THE CASE 20

CONCLUSION 24

TABLE OF CITED AUTHORITIES

Cases *Page*

Ashwander v. Tennessee Valley Authority, 297 U.S. 298 (1936) 7

Ass'n of Data Processing Services v. Camp, 397 U.S. 150 (1970) 7

Automated Salvage Transp. Inc. v. Wheelabrator Env. Sys. Inc., 155 F.3d 59 (2d Cir. 1998) 16

Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986) 7

BFI Waste System of North Am. v. Dekalb County, 303 F. Supp. 2d 1335 (N.D.Ga. 2004) 20

Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200 (2d Cir. 2003) 20

Brown Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986) 13

C&A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994) 10, 21, 22

Edgar v. MITE Corp., 457 U.S. 624 (1982) 17

Freedom Holdings v. Spitzer, 357 F.3d 205 (2d Cir. 2004) 20

Cited Authorities

Page

Harvey & Harvey v. County of Chester, 68 F.3d 788 (3d Cir. 1995) 11

Houlton Citizen's Coalition v. Town of Houlton, 175 F.3d 178 (1st Cir. 1999) 6, 10, 11

Maine v. Taylor, 477 U.S. 131 (1986) 13, 15

McNeilus Truck & Mfg. Inc. v. Ohio, 226 F.3d 429 (6th Cir. 2000) 17

Minnesota v. Cloverleaf Creamery, 449 U.S. 456 (1981) 15, 16

Mitchell v. Maurer, 293 U.S. 237 (1934) 9

The Monrosa v. Carbon Black Export Inc., 360 U.S. 180 (1959) 22

Nat'l Electrical Manufacturers Ass'n v. Sorrell, 272 F.3d 104 (2d Cir. 2001) 20

National Paint & Coatings Assoc. v. City of Chicago, 45 F.3d 1124 (7th Cir. 1995) 17, 20

New York State Trawlers Assoc. v. Jorling, 16 F.3d 1303 (2d Cir. 1994) 18

Norfolk Southern Corporation v. Oberly, 822 F.2d 388 (3d Cir. 1987) 18, 20

Cited Authorities

Page

Old Bridge Chemicals, Inc. v. New Jersey Dep't of Environmental Protection, 965 F.2d 1287 (3d Cir. 1992) 18

On the Green Apartments LLC v. City of Tacoma, 241 F.3d 1235 (9th Cir. 2001) 6, 9, 10, 11

Pacific Northwest Venison Producers v. Smitch, 20 F.3d 1008 (9th Cir. 1994) 18

Philadelphia v. New Jersey, 437 U.S. 617 (1978) .. 13

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) .... *passim*

Procter & Gamble v. Amway Corp., 242 F.3d 539 (5th Cir. 2001) 7

PSI Net Inc. v. Chapman, 362 F.3d 227 (4th Cir. 2004) 17

Steel Company v. Citizens for a Better Environment, 523 U.S. 83 (1998) 9, 11, 12

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Authority, 261 F.3d 245 (2d. Cir. 2001), *cert. denied*, 534 U.S. 1082 (2002) 21, 22

United States v. Corrick, 298 U.S. 435 (1936) 9

Cited Authorities

Page

V-1 Oil Company v. Utah State Department of Public Safety, 131 F.3d 1415 (10th Cir. 1997) 18

Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc., 454 U.S. 464 (1982) 7

Statute

Miss. Code Ann. § 17-17-319 (Supp. 2004) 5

Rule

Fed. Rule 12(b)(6) 10

SUMMARY OF THE ARGUMENT

The Court should deny the Petition because the Fifth Circuit Court of Appeals properly examined the standing of the plaintiffs to bring the action below, despite the fact that the issue was not addressed in the district court. Upon examination, the court found, *sua sponte,* that the plaintiff hauling companies did not have standing to argue that the ordinances at issue discriminated against interstate commerce. The haulers were not found to be within the zone of interests protected by the Commerce Clause, because they did not move, or plan to move, waste generated within the jurisdictions of the defendants beyond the borders of Mississippi. Nor did they move, or plan to move, waste generated outside of Mississippi into any of the three cities or three counties named here as defendants.

It is well established that a court cannot properly rule on matters of constitutional significance if it lacks jurisdiction to do so. This is so even where the jurisdictional question arises on appeal, and where, as here, the constitutional issue is more easily disposed of on the merits. The Petitioners attempt to argue the interests of other, hypothetical plaintiffs, who might be capable of showing some tangible interference with their activities in interstate commerce. Nothing in this record demonstrates such interference. These Petitioners simply failed, after both discovery and trial, to establish that their activities in the Pine Belt region were interstate in character, and thus they lacked the prudential standing required to make this argument. The Fifth Circuit correctly declined to reach the merits of the discrimination claim on speculative facts, and reserved its judgment until a proper plaintiff could appear.

The alleged conflict among the circuits on standing jurisprudence is illusory, and is based only upon dicta contained in a discursive footnote in which the Fifth Circuit criticized the factual analysis undertaken by other courts on other facts. Nothing in the ruling below misstates or misapplies the prudential rules of standing in any manner that conflicts with the rulings of the First or Ninth Circuits, or with the precedents of this Court.

The Petition should also be denied because the Court of Appeals properly applied the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The dormant Commerce Clause jurisprudence of this Court has always demanded an examination of the differential impacts of state and local legislation on regulated interests located both within and beyond the borders of the legislating state. Where local legislation serves a legitimate purpose without treating out-of-state interests differently from local interests, this Court has not hesitated to uphold local regulation. Petitioners invite the Court to re-write this most fundamental tenet of Commerce Clause jurisprudence. That invitation should be declined.

Finally, this is not an exceptional case that warrants review. The ordinances at issue here place no burden on the interstate trade in waste services. The ordinances provide the citizens of the Pine Belt region with safe, reliable and economical solid waste disposal, administered by a public agency created specifically to deliver this traditional local government service. The ordinances are applied and enforced even-handedly against all waste haulers working in the region, whether they are based within the State of Mississippi or elsewhere.

STATEMENT OF THE FACTS AND PROCEEDINGS BELOW

In 1989 and 1990, representatives of several South Mississippi cities and counties began meeting together to address the mandates of the federal and state governments concerning the proper disposal of solid waste. A professional engineering firm was retained to assist the group in the development of a thirty (30) year Solid Waste Master Plan for the region.

Over the next approximately two years a Master Plan was developed, the goal of which was "to develop an environmentally-sensitive, cost-effective solid waste management and disposal program for the Pine Belt Region."

Among other things, the Master Plan recommended (a) the creation of a regional solid waste management authority, and (b) the construction of a publicly-owned landfill to be financed through the issuance of revenue bonds. According to the Master Plan, the total approximate annual waste generated within the Authority was 153,734 tons.

In recommending the construction of a single, publicly-owned, regional landfill with transfer stations to "feed" the landfill, the Master Plan discussed alternatives including each city and county having its own disposal facility and the construction of two regional landfills. These alternatives were rejected by the Master Plan because of the cost-effectiveness of a single regional landfill.

The Plan was adopted in July, 1992, by what had by then become the Pine Belt Regional Solid Waste Management Authority ("Pine Belt," "the Authority," or "Pine Belt

Authority"), and was submitted to the Mississippi Department of Environmental Quality for its approval.

The Authority's landfill opened in April, 1997, and has been providing secure and reliable waste disposal to the Pine Belt region ever since. The Authority issued $7.4 million in bonds to finance the start-up costs (engineering and legal) and construct the first "cell" to begin receiving solid waste. In 2000, those bonds were refinanced, and $9.085 million in bonds were issued, because of lower interest rates and to construct a second "cell". At the time of the trial, the Authority had $7.520 million in outstanding bonds.

From a high of 129,017 tons in fiscal year (FY) 2000, the Authority saw a decrease in tonnage to 108,625 tons in FY 2001, and to 95,205 tons in FY 2002. Because the Authority had no source of funds to operate and pay its bonded indebtedness other than the payment of those seeking to dispose of their waste at the Authority's landfill, the Authority's ability to make its July 1, 2004, bond payment was in serious doubt, according to its independent certified public accountant.

Believing that the viability of the Authority's facilities (i.e., its landfill and transfer stations) was in question, the Authority's Board of Commissioners adopted a resolution in July, 2002, directing the cities and counties that comprise the Authority to adopt flow control ordinances.[1] Each of the three cities and three counties did so, with the effective date of the ordinances to be September 1, 2002.

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[1] Stone County, Mississippi, was in the process of being admitted to the Authority at the time of trial, but the Authority did not direct Stone County to adopt a flow control ordinance.

On August 29, 2002, Waste Management of Mississippi, Inc., BFI Waste Systems, and BFI Waste Systems of Mississippi, LLC (hereafter, "Waste Management" and "BFI"), together with Pine Belt Waste Systems, LLC, filed a Complaint for Declaratory, Injunctive and Monetary Relief against Pine Belt and the cities and counties that make up that regional solid waste management authority. The parties agreed that the ordinances would not be enforced until a hearing on the Petitioners' Motion for Preliminary Injunction could be held.

Trial was held in December, 2002, and in April, 2003, the district court granted the relief sought by Waste Management and BFI. Pine Belt and the three cities and counties that had adopted flow control ordinances, together with the Attorney General of Mississippi[2] perfected their appeal to the Fifth Circuit Court of Appeals.

In October, 2003, the Fifth Circuit unanimously dismissed the Petitioners' Complaint in part for lack of standing and reversed and rendered with respect to the remainder; and in January, 2005, that court unanimously denied the Petitioners' Petition for Rehearing.

* * * *

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[2] The Attorney General of Mississippi had intervened because the Petitioners had arguably challenged the constitutionality of the state statute that permitted regional solid waste management authorities to adopt flow control ordinances "to ensure the viability" of its waste disposal facilities. *See Miss. Code Ann.* § 17-17-319 (Supp. 2004).

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS PROPERLY EXAMINED THE STANDING OF THE PLAINTIFFS BEFORE REACHING THE MERITS OF THE DISCRIMINATION CLAIM

The Petitioners' alleged "conflict" among the Circuits over the prudential requisites for standing in the federal courts is no conflict at all. The language cited by Petitioners as the foundation for this conflict is contained in footnote 16 of the Fifth Circuit's decision (Appendix A to Petition for Writ of Certiorari (hereafter "App.") pp. 14a-15a), which forms no part of the ruling of the Court. It is dicta, reflecting the court's observation that the Ninth Circuit in *On the Green Apartments LLC v. City of Tacoma,* 241 F.3d 1235 (9th Cir. 2001), and the First Circuit in *Houlton Citizens' Coalition v. Town of Houlton,* 175 F.3d 178 (1st Cir. 1999) should properly have considered the jurisdictional questions presented before reaching the merits of the constitutional claims advanced in those cases. All three courts rejected the Commerce Clause challenges to the flow control laws before them, but the Fifth Circuit properly addressed, *sua sponte,* the standing issues raised by the facts developed at trial before reaching the merits of the constitutional claims.

The ruling of the Fifth Circuit in this case was premised on sound Fifth Circuit and Supreme Court precedent. It has long been the practice of this Court not to "'anticipate a question of constitutional law in advance of the necessity of deciding it;'" nor to "'decide questions of a constitutional nature unless absolutely necessary to a decision of the case;'" nor to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied;'"

nor to "'pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.'" *Ashwander v. Tennessee Valley Authority,* 297 U.S. 298, 346-47 (1936) (citations omitted) (Brandeis, J. concurring).

The affirmative obligation of a plaintiff to demonstrate that it has both the Article III and prudential requisites for standing serves a practical purpose: "It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 542 (1986), *quoting Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982).

> The goal of the prudential standing requirements is to "determine whether the plaintiff 'is a proper party to invoke judicial resolution of the dispute and the court's remedial powers.'" App. at p. 13, *citing Procter & Gamble v. Amway Corp.,* 242 F.3d 539, 560 (5th Cir. 2001) and *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 545 n.8 (1986).

The key inquiry for prudential standing in turn is "whether the injury of which plaintiffs complain is 'arguably within the zone of interests to be protected' by the dormant Commerce Clause." App. at p. 12a, *citing Ass'n of Data Processing Services v. Camp,* 397 U.S. 150, 153 (1970). On the record below, Petitioners have not shown that their activities in the Pine Belt region are sufficiently connected with interstate commerce to provide the concrete factual context appropriate to constitutional adjudication.

Two salient facts were established at trial in this case. First, the Petitioners do not ship, and have never shipped, waste collected in the Region to any point outside of the State of Mississippi. It is undisputed that Petitioners BFI and Waste Management currently deliver, and would continue to deliver, waste collected in the Region only to landfills elsewhere in Mississippi. Indeed, the complaint in this case did not allege that the local laws at issue would prevent these parties from transporting Regional waste in interstate commerce, merely that they would be prevented from transporting waste to "landfills of their own choosing." At trial, it was conceded that the landfills chosen by Petitioners were all within the state of Mississippi.

Second, the Petitioners did not establish that the operation of the local laws would indirectly affect their operations outside of Mississippi to any greater degree than they would affect their local operations, or that the laws would be enforced differently based upon the citizenship or place of incorporation of an affected waste hauler. Petitioners claimed that they held contracts with different entities which spanned the jurisdictions of several states, and that increased costs within the Region due to the application of the local laws would increase their costs, and reduce their competitiveness, in areas beyond Mississippi. However, Petitioners did not show that out-of-state consumers of their services would not be served as well by other members of the hauling industry even if Petitioners were handicapped to some degree by the operation of the local laws. Petitioners also failed to show that they would be less competitive with respect to other haulers within the Region because the laws would equally apply to all haulers.

These facts would have been fatal to the haulers' discrimination claim had standing been granted. However, rather than reaching that question, the Fifth Circuit looked first to its jurisdictional responsibility. "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Steel Company v. Citizens for a Better Environment,* 523 U.S. 83, 95 (1998), quoting *Mitchell v. Maurer,* 293 U.S. 237, 244 (1934).

The Supreme Court in *Steel Company* emphasized that the need to resolve jurisdictional questions is paramount, because without jurisdiction, the Court is without power to adjudicate constitutional issues:

> And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit. *Steel Company,* 523 U.S. at 95, *quoting United States v. Corrick,* 298 U.S. 435, 440.

In footnote 16 of its decision, the Fifth Circuit noted that it was logically inconsistent for the Ninth Circuit to find that because the *On the Green* plaintiffs had no intention of shipping waste outside the state of Washington, Tacoma's law "did not implicate the Commerce Clause" and at the same time find that the plaintiffs in *On the Green* fell within the zone of interests protected by the Commerce Clause. It also

took issue with the First Circuit's view that an assertion of general economic interests, without particular reference to interstate trade, was sufficient to bring the *Houlton* plaintiffs within the zone of interests protected by the Commerce Clause.

In both *On the Green* and *Houlton*, the Circuit Courts found the plaintiffs had standing to sue, but then decided against them on the merits. The Court in *On the Green* reviewed the case in the context of a motion to dismiss for failure to state a claim under Federal Rule 12(b)(6). While finding that the plaintiff had standing to challenge Tacoma's requirement that all self-haulers deliver their waste to Tacoma's transfer station, the Court also found that "[b]ecause *On the Green* alleges only that it would deposit its waste in another city in Washington, the Commerce Clause is not implicated." 241 F.3d at 1242. The Court then affirmed the dismissal of the complaint under Rule 12(b)(6).

In *Houlton,* the First Circuit reviewed the case after the district court granted summary judgment to the Town and upheld the local flow control scheme. The Court of Appeals affirmed. The Court first rejected plaintiffs' argument that this Court's decision in *C&A Carbone, Inc. v. Clarkstown,* 511 U.S. 383 (1994), was a blanket prohibition against all flow control laws under any circumstances:

> We do not interpret *Clarkstown* as explicating a broad-based ban on every flow-control ordinance that happens to be coupled with an exclusive contractual arrangement in favor of an in-state operator. *Houlton,* 175 F.3d at 188.

The Court then affirmed the district court's grant of summary judgment under the rationale developed by the Third Circuit in *Harvey & Harvey v. County of Chester,* 68 F.3d 788 (3d Cir. 1995), relying on the fact that the Town Council of Houlton had selected its designated contractor through an open process of competitive bidding, just as, in the instant case, the Pine Belt Authority has chosen its landfill operator through a competitive interstate selection process.

Here, as was arguably the case in *On the Green* and *Houlton*, the same facts that could not support standing would also defeat Petitioners' discrimination claim on the merits. To the extent that the decisions in *On the Green* and *Houlton* failed to seriously discuss the prudential requirements for standing, they may be viewed as examples of the doctrine of "hypothetical jurisdiction" which the Supreme Court has expressly rejected. The doctrine consists of the practice of reaching the merits of an issue despite jurisdictional uncertainty, where "(1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Steel Company,* 523 U.S. at 93.

Consequently, the Fifth Circuit's recognition of the jurisdictional problem raised by Petitioners' inability to allege or prove disruption of interstate shipments of waste was appropriate. Even though Petitioners could not have stated or proven a claim of discrimination under the Commerce Clause, in the absence of jurisdiction, the Court of Appeals lacked the power to make that determination.

Had the Fifth Circuit entertained the question of discrimination despite the lack of any evidence to establish it, the Court would have been forced to speculate as to

hypothetical injuries suffered by hypothetical third parties. These parties, unlike Petitioners, would have shipped waste subject to these ordinances into or out of Mississippi, in speculative amounts, with speculative consequences. Such an exercise would amount to the issuance of an advisory opinion, a practice which this Court has always condemned. *Steel Company,* 523 U.S. at 121-22 (Stevens, J., concurring). Instead, the Court of Appeals wisely elected to defer consideration of the constitutional discrimination claim until a proper plaintiff could be found, which, as this Court has long observed, is the prudent judicial practice.

Finally, if there was error in the decision of the Court of Appeals, the error was to find that Petitioners had standing to argue that the laws presented even incidental burdens on interstate commerce. Only minimal facts were presented by Petitioners to show harm to their own activities in interstate commerce. Both BFI and Waste Management submitted affidavits that claimed the challenged ordinances tended to increase their costs of doing business in Mississippi. These increased costs, it was claimed, would have a "ripple effect" on business conducted in other states, and therefore the local ordinances placed a burden upon Petitioners' interstate commerce. (App., pp. 15a-16a). These burdens were not quantified with proof of loss at trial, but the Court of Appeals found standing based upon the allegation of a burden, ruling that the Petitioners were "arguably within the appropriate zone of interests" and thus eligible to challenge whether the ordinances excessively burdened interstate commerce.

The showing made by Petitioners was little more than a claim that the costs incurred by complying with the regulation could impact an interstate business' bottom line. Such a

showing could be made with respect to any regulation by virtually any interstate business. It would not have been inappropriate for the Fifth Circuit to require more than this. However, the lack of proof of any tangible burden on interstate commerce was recognized by the Court in its decision on the merits.

II. THE FIFTH CIRCUIT'S APPLICATION OF THE PIKE BALANCE PROPERLY SEARCHED FOR DISPARATE IMPACTS ON IN-STATE AND OUT-OF–STATE INTERESTS.

> [T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

Brown Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986).

This Court's dormant Commerce Clause jurisprudence has established a two-tiered approach to local regulation. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, it is considered to be virtually *per se* invalid, *Philadelphia v. New Jersey,* 437 U.S. 617 (1978), except in the rare case where the state has no alternative to achieve its purpose. *Maine v. Taylor,* 477 U.S. 131 (1986). "When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest

is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Petitioners suggest that the Fifth Circuit has misconstrued the balancing test set forth in *Pike*, by requiring that plaintiffs show some differential treatment of in-state and out-of-state interests in order to establish an incidental burden on interstate commerce. They argue that if a local law is found to "regulate even-handedly," then no disparate impact on in-state or out-of-state interests could exist, and none need be shown to establish an incidental burden on interstate commerce. The suggestion would turn the Court's long-standing two-tiered approach to local regulation on its head.

The flaws in Petitioners logic are apparent and dangerous. First, there can be no presumption that a law found to "regulate even-handedly" must therefore be wholly free of any indirect or latent impacts to interstate commerce. No court could be presumed to be so omniscient in reading the text of a statute.

Second, the presumption that a finding of "even-handed regulation" means the absence of *any* disparate treatment of in-state and out-of-state concerns, implies that *all* disparate impacts of a statute on interstate commerce, however minor, would necessarily constitute discrimination against interstate commerce.

Third, if all disparate impacts on out-of-state interests that might arise from the operation of a local regulation were to be considered "discrimination" against interstate commerce by the courts, then all such regulations would be

"virtually *per se* invalid" and few, if any, would survive the strict scrutiny required by *Maine v. Taylor.* If this were the case, the impact recognized in *Pike* itself, where the application of a facially neutral statute was found to burden commerce indirectly and *as applied* to the party bringing suit, could never have been balanced against the putative benefits of the law.[3] The result would be an evisceration of the *Pike* balance as it has been applied for the past thirty years.

Finally, Petitioners suggest no alternative minimal showing to establish an incidental burden on interstate commerce. If, for example, a multi-state business need only show that a regulation increases the cost of doing business in one state versus another to establish an incidental burden and trigger the balancing test, then there will be no limit to the number of regulations the courts may be called upon to examine for their putative local benefits. This would require the courts to pass judgment on the wisdom and cost of virtually any legislation affecting commerce, and to substitute its judgment for that of the local legislatures, a function which the Supreme Court has held that the judiciary cannot assume. *See Minnesota v. Cloverleaf Creamery,* 449 U.S. 456, 469 (1981).

There is no need for this Court to undertake such a massive re-evaluation of its dormant Commerce Clause jurisprudence. The ruling of the Fifth Circuit established no new definition of "incidental burden" in the context of *Pike.*

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[3] *Pike* involved the application of an Arizona law requiring labels on cantaloupes grown in Arizona. While the court found the law to be neutral on its face, an incidental burden on interstate commerce was found when it was applied to an Arizona farmer who was effectively prohibited from employing a packing plant located in California.

Examination of disparate impacts on in-state and out-of-state commercial activity is a fundamental inquiry where, as here, economic protectionism is alleged to be the constitutional flaw.

In the context of the economic protectionist claim made by Petitioners, the Fifth Circuit adopted the phrasing of the Second Circuit in *Automated Salvage Transp. Inc. v. Wheelabrator Env. Sys. Inc.,* 155 F.3d 59 (2d Cir. 1998), defining incidental burdens as "those burdens on interstate commerce which exceed the burdens on intrastate commerce." (App., p. 18a) The Second Circuit in turn drew its working definition of incidental impacts from *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 471-72, (1981). In *Clover Leaf Creamery,* the Court found that Minnesota's milk packaging law did not discriminate against interstate commerce in either purpose or effect, and viewed the difficulty of out-of-state milk packagers in complying with the law as the incidental burden that it placed on interstate commerce:

> Even granting that the out-of-state plastics industry is burdened *relatively more heavily than* the Minnesota pulpwood industry, we find that this burden is not "clearly excessive" in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems . . .

449 U.S. 456, 473 (emphasis added).

Petitioners show no actual conflict among the circuits in the application of *Pike.* Other recognizable burdens on interstate commerce, such as an inappropriate extra-territorial

effect of a state law (*e.g.*, *PSI Net Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004)) or inconsistency with federal law or the regulatory regimes of other states (*e.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624 (1982)) require no close analysis of disparate impacts because the difficulty with such laws is not that they are applied unevenly, but that they cannot be obeyed without inherent conflict in other states. Similarly, Petitioners misinterpret cases where courts have found little or no legitimate local benefit from local regulation (*e.g.*, *McNeilus Truck & Mfg. Inc. v. Ohio*, 226 F.3d 429 (6th Cir. 2000)) to eliminate the need to articulate an incidental impact. In cases where economic protectionism is alleged, disparate impact analysis is indispensable.

The phrases "disparate impact" and "disparate treatment" entered the Commerce Clause lexicon most vividly in the Seventh Circuit, in *National Paint & Coatings Assoc. v. City of Chicago*, 45 F.3d 1124 (7th Cir. 1995). With Judge Easterbrook's succinct phrasing, "No disparate treatment, no disparate impact, no problem under the dormant commerce clause," the Seventh Circuit upheld Chicago's anti-graffiti regulations. *Id.* at 1132. Both the Second and Seventh Circuits have repeatedly employed the language used in *National Paint & Coatings* to describe the "bottom-line" showing that is necessary in a Commerce Clause case, but neither Circuit has adopted a substantively different test than that endorsed by the Supreme Court, or any other Circuit.

Indeed the Third, Ninth, and Tenth Circuits have joined the Second, Seventh and Fifth Circuits in defining "incidental burdens" under *Pike* in remarkably similar language. "Thus, where the burden on out-of-state interests rises no higher than that placed on competing in-state interests, it is a burden on *commerce* rather than a burden on *interstate*

commerce," *Old Bridge Chemicals, Inc. v. New Jersey Dep't of Environmental Protection*, 965 F.2d 1287, 1295 (3d Cir. 1992); "[I]ncidental burdens are the burdens on interstate commerce that exceed the burdens on intrastate commerce," *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994), *citing New York State Trawlers Assoc. v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994); "The 'incidental burdens' of the *Pike* inquiry 'are the burdens on interstate commerce that exceed the burdens on intrastate commerce,'" *V-1 Oil Company v. Utah State Department of Public Safety*, 131 F.3d 1415, 1425 (10th Cir. 1997).

The Third Circuit specifically addressed and rejected the argument that simple excess costs can be a burden in *Norfolk Southern Corporation v. Oberly*, 822 F.2d 388 (3d Cir. 1987):

> The district court found a material dispute of fact with respect to the "putative benefits" side of the balance, pointing to disputes over the magnitude and environmental consequence of predicted coal spills and dust emissions. 632 F. Supp. at 1242-43. We conclude that it is unnecessary to review this conclusion because the record reveals no legally relevant burden on interstate commerce that could be found to be "excessive."
>
> *The "incidental burden on interstate commerce" appropriately considered in Commerce Clause balancing is the degree to which the state action incidentally discriminates against interstate commerce relative to intrastate commerce.* It is a comparative measure. There concededly is language suggesting that any increased costs

> imposed on out-of-state interests, in an absolute sense, are relevant burdens regardless of whether the same costs are imposed on in-state interests. However, we find that the holdings of the Supreme Court case law, consistent with the anti-protectionism purpose of the Commerce Clause, apply the much narrower comparative burden concept. As earlier noted, virtually all state regulation involves increased costs for those doing business within the state, including out-of-state interests doing business in the state as well as in-state interests. In this absolute sense, virtually all state regulation "burdens" interstate commerce. Where the "burden" on out-of-state interests is no different from that placed on competing in-state interests, however, it is a burden on *commerce* rather than a burden on *interstate* commerce. In such cases, nothing in Commerce Clause jurisprudence entitles out-of-state interests to more strict judicial review than that to which the in-state interests are entitled, i.e., arbitrary and capricious review under the Due Process Clause and rational basis review under the Equal Protection Clause, neither of which involves the kind of social value balancing that Norfolk Southern urges us to undertake. [Emphasis added.] 822 F.2d at 406.

Here, the Court of Appeals identified the economic vitality of the Pine Belt landfill as a legitimate public purpose. (App., p. 17a). The municipalities and counties of the Pine Belt Authority take a more expansive view of the benefits of the local laws, and would stress the environmental security provided by the landfill itself as the primary public

purpose advanced by these laws. Nevertheless, the Fifth Circuit need not have made reference to other benefits because under *Pike,* if no incidental burden on interstate commerce is established, any legitimate purpose will tip the balance in favor of the challenged legislation. The Court's inquiry logically and properly ends with a finding that there is neither discrimination nor an incidental burden on commerce. *Nat'l Electrical Manufacturers Ass'n v. Sorrell,* 272 F.3d 104 (2d Cir. 2001); *Brown & Williamson Tobacco Corp. v. Pataki,* 320 F.3d 200 (2d Cir. 2003); *Freedom Holdings v Spitzer*, 357 F.3d 205 (2d Cir. 2004); *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987); *National Paint & Coatings Association v. City of Chicago*, 45 F.3d 1124 (7th Cir. 1995); *BFI Waste System of North Am. v. Dekalb County*, 303 F. Supp. 2d 1335 (N.D.Ga. 2004). Because Petitioners failed to show any incidental burden, it was unnecessary for the Court of Appeals to engage in an exhaustive review of the benefits of the local laws.

III. THE CONSTITUTIONAL ISSUES SUGGESTED BY THE PETITION ARE RAISED IN AN ABSTRACT CONTEXT UNRELATED TO THE FACTS OF THE CASE

The Petitioners invite the Court to engage in a broad review of both the scope of the zone of interests test as a prudential requirement for standing, and to greatly expand and re-define the concept of an incidental burden on commerce under *Pike v. Bruce Church, Inc.* Petitioners suggest that conflicts among the circuits with respect to the zone of interests test "may be attributable to a certain lack of clarity in this Court's zone of interests case law." (Petition, p. 11) Similarly, Petitioners urge that *Pike v. Bruce Church, Inc.* be re-interpreted to eliminate the need for courts to

compare the intrastate and interstate impacts of a local regulation to determine whether an incidental burden on interstate commerce is present.

Even if this Court believes that its zone of interest case law requires clarification, or that it should re-examine the nature of incidental burdens on interstate commerce, this case contains neither the record nor the briefing below to support an appropriate inquiry into either issue.

This case came to the district court as a challenge to local waste ordinances under the purported authority of *C&A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994). The defendant cities and counties argued that the facts of this case were distinguishable from those present in *Carbone*, and that the matter should have been decided under the analysis performed by the Second Circuit Court of Appeals in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Authority,* 261 F.3d 245 (2d Cir. 2001), *cert. denied,* 534 U.S. 1082 (2002). In addressing a similar set of local laws, the Second Circuit found no discrimination against interstate commerce because the facilities benefited by the laws were publicly owned, distinguishing the factual situation in *Carbone.*[4] Here, as in *United Haulers,* the regional landfill to which waste is directed is a public facility, operated by a private contractor chosen through competitive bidding.

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[4] The *United Haulers* court remanded the matter to the district court for application of the *Pike* balancing test. The district court ruled in March 2005 that the laws did not place an incidental burden on interstate commerce and granted summary judgment to the defendant municipalities. That decision is currently on appeal to the Second Circuit.

The parties in the case at bar tried the case on the public/ private distinction recognized in *United Haulers*. The district court noted that the Fifth Circuit had not addressed the issue, and in the absence of binding precedent, held that the laws discriminated against interstate commerce, citing *Carbone*. 261 F. Supp. 2d 644, 649-650 (S.D.Miss. 2003). The parties briefed and argued the public/private distinction in the Court of Appeals, but the Court did not reach the issue of discrimination because it found the Petitioners lacked standing to raise it. Neither party below argued for any new formulation of the *Pike* balance.

The Fifth Circuit examined the standing of Petitioners *sua sponte*, and while this examination was appropriate, it was fact-specific to the record below, and totally unsuited to the breadth of review of the zone of interests test suggested by Petitioners. For example, the record is devoid of evidence to indicate that either the parties or the Court considered for a moment the different roles for the zone of interest test in cases brought under the Administrative Procedure Act and those brought in non-APA cases. (Petition, p. 11). Even if there is a question as to "what role remains for the zone of interest test in constitutional cases" this case is not the one to answer it.

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the courts of appeal is judicial, not simply administrative or managerial. Resolution here [of this issue] can await a day when the issue is posed less abstractly. *The Monrosa v. Carbon Black Export, Inc.*, 360 U.S. 180, 184 (1959).

The Court should defer the resolution of any perceived conflict among the courts of appeal on the zone of interests test until it is presented with a case in which the parties and the lower courts have addressed the zone of interests test in a concrete context.

The Commerce Clause issues raised by Petitioners are similarly abstract, if not simply too far-fetched for consideration. As shown above, the application of the balancing test in *Pike v. Bruce Church, Inc.* by the Court of Appeals was not a departure from any generally recognized principle of commerce clause jurisprudence, but a fact-specific application of well-know analytical principles to the facts developed at trial. Petitioners did not succeed in meeting the ordinary standard for balancing the burdens on interstate commerce against the benefits of the challenged legislation, so they now ask the Court to adopt a new standard. What that standard might be is unclear, except that it would not require much consideration of geography, state sovereignty, in-state economic impacts, or out-of-state economic impacts.

The decision here represents no new law in dormant commerce clause jurisprudence. The Court of Appeals simply applied well-established law to unique facts. Nothing in this record compels an over-haul of the Court's time-tested two-tiered analysis.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 6 - 2005
OFFICE OF THE CLERK

(3)

No. 04-1333

In the Supreme Court of the United States

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; BFI WASTE SYSTEMS OF NORTH AMERICA, INC.; BFI WASTE SYSTEMS OF MISSISSIPPI, LLC; AND WASTE MANAGEMENT OF MISSISSIPPI, INC.

Petitioners,

v.

PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY AND ITS BOARD OF COMMISSIONERS, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. The Fifth Circuit's Standing Decision Conflicts With Those Of Other Courts Of Appeals 1

B. The Conflict In The Circuits Regarding The Meaning Of The *Pike* Test Warrants Review 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

A.C.L.U. v. *Johnson*, 194 F.3d 1149 (10th Cir. 1999) 7

Blue Circle Cement, Inc. v. *Board of County Comm'rs*, 27 F.3d 1499 (10th Cir. 1994) 7

C & A Carbone, Inc. v. *Town of Clarkstown*, 511 U.S. 383 (1994) 8

Clarke v. *Sec. Indus. Ass'n*, 479 U.S. 388 (1987) 4

Houlton Citizens' Coalition v. *Town of Houlton*, 175 F.3d 178 (1st Cir. 1999) 1, 2, 3

McNeilus Truck & Manufacturing, Inc. v. *Ohio*, 226 F.3d 429 (6th Cir. 2000) 8

Minnesota v. *Clover Leaf Creamery*, 449 U.S. 456 (1981) 8

On the Green Apartments LLC v. *City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001) 1, 2, 3

PSINet, Inc. v. *Chapman*, 362 F.3d 227 (4th Cir. 2004) 7

Pacific Northwest Venison Producers v. *Smitch*, 20 F.3d 1008 (9th Cir. 1994) 6

Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) ..... *passim*

R & M Oil & Supply, Inc. v. *Saunders*, 307 F.3d 731 (8th Cir. 2002) 6

U & I Sanitation v. *City of Columbus*, 205 F.3d 1063 (8th Cir. 2000) 6

V-1 Oil Co. v. *Utah State Dept. of Pub. Safety*, 131 F.3d 1415 (10th Cir. 1997) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

Wachovia Bank, Nat'l Ass'n v. *Schmidt*, No. 04-1186 (cert. granted June 13, 2005) 5

Miscellaneous

Siegel, Zone of Interests, 92 GEO. L.J. 317 (2004) 5

PETITIONERS' REPLY BRIEF

Respondents vigorously defend every aspect of the Fifth Circuit's analysis – except for that Court's candid acknowledgement that its decision on standing cannot be reconciled with the holdings of two other courts of appeals. Yet the existence of that conflict, which involves an important and recurring issue, is not fairly debatable. At the same time, respondents are able to deny the existence of a division in the circuits concerning the meaning of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), only by wholly ignoring most of the decisions that reject the test applied by the Fifth Circuit in this case. In short, respondents' merits-focused brief fails to offer any plausible reason why the Court should decline to resolve the two significant conflicts among the circuits identified in the petition.

A. The Fifth Circuit's Standing Decision Conflicts With Those Of Other Courts Of Appeals

1. The court below expressly recognized that its decision on standing departs from the holdings of the First and Ninth Circuits in *Houlton Citizens' Coalition* v. *Town of Houlton*, 175 F.3d 178 (1st Cir. 1999), and *On the Green Apartments LLC* v. *City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001). See Pet. App. 14a-15a n.16. In nevertheless maintaining that the circuits are not really in conflict on the meaning of the zone of interests doctrine, respondents do not deny that the factual settings in *Houlton* and *On the Green Apartments* were identical to the one here: in those cases, as in this one, plaintiffs challenged the constitutionality of flow control ordinances even though the plaintiffs were not shipping waste across state lines at the time of the litigation. See Pet. 9. Instead, respondents insist that the Fifth Circuit's recognition of a conflict was "dicta, reflecting the court's observation that the Ninth Circuit * * * and the First Circuit * * * should properly

have considered the jurisdictional questions presented before reaching the merits of the constitutional claims advanced in those cases." Br. in Opp. 6. Respondents add that the decisions of the First and Ninth Circuits "may be viewed as examples of the doctrine of 'hypothetical jurisdiction.'" *Id.* at 11. This contention, however, is wrong on every count.

To begin with, there was nothing in the least "hypothetical" about the First and Ninth Circuit's resolution of the standing question: those courts expressly and inarguably held that the plaintiffs satisfied the zone of interests test before turning to resolve the merits of the Commerce Clause claims. In a section of its opinion labeled "STANDING" (*Houlton*, 175 F.3d at 182-183), the First Circuit specifically held that that the plaintiff "avoids any concerns relative either to *jus tertii* * * * or to the zone of interests requirement." *Id.* at 183. The court added that the plaintiff's "claim to standing is not damaged because he failed to allege that he hauled garbage out-of-state or planned to do so. * * * [A]n in-state business which meets constitutional and prudential requirements due to the direct or indirect effects of a law purported to violate the dormant Commerce Clause has standing to challenge the law." *Ibid.* Similarly, in *On the Green Apartments* the Ninth Circuit explained that it "must first consider whether [plaintiff] has standing to challenge this provision of the law" (241 F.3d at 1240) before holding, after considerable analysis, that the plaintiff "has satisfied the prudential element of standing with respect to its challenge to Tacoma's 'flow control' requirement." *Id.* at 1241.[1]

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[1] There can be no doubt that the Ninth Circuit was well aware of its obligation to resolve the question of standing before turning to the merits: after explaining that the plaintiff's "'complaint must fall within the zone of interests to be protected or regulated by the' Commerce Clause" (241 F.3d at 1239 (citation and internal quotation marks omitted by the court)), the court held that the plaintiff

Nor did the court below criticize the First and Ninth Circuits on the ground that they "should properly have considered the jurisdictional questions presented before reaching the merits of the constitutional claims advanced in those cases," as respondents assert. Br. in Opp. 6.[2] To the contrary, the Fifth Circuit criticized the other courts for giving the *wrong answer* to the jurisdictional question. After describing in detail the holdings of the First and Ninth Circuits that the plaintiffs in *Houlton* and *On the Green Apartments* had standing, the Fifth Circuit explained that its "conclusion that plaintiffs [in this case] do not meet the prudential standing requirement differs from that in two opinions from our sister circuits," taking specific pains to "disagree" with the determination of the First and Ninth Circuits that "the plaintiffs met the prudential standing requirements." Pet. App. 14a-15a n.16. This clear and acknowledged conflict in the courts of appeals cannot be wished away.

2. Respondents get no farther by contending that "Petitioners have not shown that their activities in the Pine Belt

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lacked standing to contend that "it is forced to pay for waste disposal services it would like to provide for itself" because that "injury is unrelated to the purposes animating the dormant Commerce Clause." *Id.* at 1239-1240. The court accordingly did not reach the merits of that aspect of the plaintiff's challenge to the Tacoma flow control ordinance. See *id.* at 1240.

[2] Respondents are wrong in asserting that the court below "criticized the factual analysis undertaken by other courts on other facts." Br. in Opp. 2. The Fifth Circuit said nothing at all about the "factual analysis" engaged in by other courts; it criticized the Ninth Circuit because (it believed) that court misunderstood the zone of interests test (see Pet. App. 14a n.16), and rejected the holding of the First Circuit because (it believed) that court "viewed too broadly the zone of interests protected by the dormant Commerce Clause." *Id.* at 15a n.16. These criticisms are wholly legal in nature.

region are sufficiently connected with interstate commerce to provide the concrete factual context appropriate to constitutional adjudication." Br. in Opp. 7. See *id.* at 8-9, 11-12. This argument, which amounts to a defense of the merits of the Fifth Circuit's standing analysis, does not offer a reason for this Court to decline to resolve the significant conflict in the circuits over the meaning of the zone of interests test. After all, the First and Ninth Circuits rejected precisely the approach to standing that is now advocated by respondents.

In any event, respondents simply disregard the showing made in the petition (at 12-15) that the Fifth Circuit's analysis (and respondents' current argument) misunderstands the purposes of the zone of interests test. As we have explained, standing is appropriate when, as here, the plaintiff is "itself the subject of the contested regulatory action" (*Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)) and seeks to advance the constitutional "objectives." *Id.* at 397 n.12. And petitioners did not ask the court "to speculate as to hypothetical injuries suffered by third parties," as respondents assert (at Br. in Opp. 11-12); petitioners want to settle their *own* entitlement to ship waste across state lines so that they are able to respond immediately when changes in circumstances or market conditions dictate that course. Although we made this point in the petition (at 13), respondents offer no response.[3]

3. Finally, respondents do not deny that the law relating to the zone of interests requirement is confused and requires clarification by this Court. See Pet. 8, 11-12. That point

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[3] Respondents' argument that petitioners' failure to transport Pine Belt waste across state lines at the time of trial "would have been fatal to [their] discrimination claim had standing been granted" (Br. in Opp. 9) misses the whole point of the current argument; petitioners seek standing to argue discrimination against interstate commerce *even though* they had not yet had occasion to move waste from the Pine Belt jurisdictions across state lines.

seems inarguable: the conflict among the courts of appeals that is presented here graphically demonstrates that the current state of confusion regarding the zone of interests doctrine has "left the lower courts somewhat rudderless and * * * produced a system in which different categories of plaintiffs receive unfairly differing treatment." Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 341 (2004). And respondents are wrong in contending that the record in this case is somehow inadequate to permit "an appropriate inquiry" into the zone of interests issue. Br. in Opp. 21, 22-23. The relevant facts about the nature of petitioners' business operations are undisputed; respondents do not, and could not, identify *any* respect in which the record here is incomplete or in which the standing issue could be presented in a more "concrete context." *Id.* at 23.

Respondents' real complaint appears to be that, because the issue of standing was raised by the court of appeals *sua sponte*, it was not fully briefed below. See Br. in Opp. 22. But the standing question was addressed at length and in detail by the court of appeals, which carefully considered and rejected the contrary approaches taken by other circuits. The Fifth Circuit then declined to reconsider the issue, after briefing by both parties, when petitioners sought rehearing. In similar circumstances, when a court of appeals decides an important jurisdictional issue on its own motion, this Court has not hesitated to grant review. See, *e.g.*, *Wachovia Bank, Nat'l Ass'n* v. *Schmidt*, No. 04-1186 (cert. granted June 13, 2005). The same course is appropriate here.

B. The Conflict In The Circuits Regarding The Meaning Of The Pike Test Warrants Review

1. As we showed in the petition (at 17-20), the courts of appeals also are divided on how to apply the balancing approach of *Pike* v. *Bruce Church, Inc.* In this case, the court below followed the Second Circuit in holding that the *Pike*

test comes into play only if the challenged state regulation has a disparate impact on interstate commerce.[4] In contrast, the Eighth, Fourth, Sixth, and Tenth Circuits have held that the *Pike* principle will invalidate evenhanded state laws when the burdens imposed on interstate commerce greatly exceed the local benefits, even if those laws do *not* have a disparate impact on interstate commerce. As we also showed, the choice of one or the other of these standards often will be outcome-determinative.

Although respondents deny that the courts of appeals are in conflict on the meaning of *Pike* (Br. in Opp. 16-17), they make absolutely no attempt to explain away the decisions of the courts that reject the Fifth Circuit's approach. Respondents thus do not cite, let alone attempt to distinguish, the holdings of the Eighth Circuit – including one that applied *Pike* to invalidate a flow control ordinance that was essentially identical to the Pine Belt ordinances upheld in this case. See Pet. 18-19 (citing *U & I Sanitation* v. *City of Columbus*, 205 F.3d 1063 (8th Cir. 2000), and *R & M Oil & Supply, Inc.* v. *Saunders*, 307 F.3d 731 (8th Cir. 2002)). Nor do respondents acknowledge or attempt to distinguish decisions of the

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[4] We noted that the Seventh Circuit uses a similar approach. Pet. 18 n.8. Respondents maintain that the Third, Ninth, and Tenth Circuits also require demonstration of a disparate effect on interstate commerce before the *Pike* test comes into play. Br. in Opp. 17-19. We take issue with respondents' reading of some of these decisions: the Ninth Circuit opinion cited by respondents indicated only that state regulations "arguably" are not subject to invalidation under the Commerce Clause when, among other things, they do not "fall more heavily on out-of-state interests" (*Pacific Northwest Venison Producers* v. *Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994)); the Tenth Circuit's rule is addressed below, at note 5. In any event, however, respondents' interpretation of these decisions serves only to confirm the breadth of the conflict and depth of the confusion in the courts of appeals.

Tenth Circuit that found *Pike* applicable even in the absence of a disparate impact on interstate commerce. See Pet. 20 (citing *Blue Circle Cement, Inc.* v. *Board of County Comm'rs*, 27 F.3d 1499 (10th Cir. 1994), and *A.C.L.U.* v. *Johnson*, 194 F.3d 1149 (10th Cir. 1999)).[5] And while respondents refer to the decisions of the Fourth and Sixth Circuits that are cited in the petition (see Br. in Opp. 17), they simply ignore the relevant portions of those holdings, which indicate that the *Pike* doctrine may invalidate a neutral and nondiscriminatory state law when "the burdens it imposes on interstate commerce are excessive in relation to the local benefits it confers." *PSINet, Inc.* v. *Chapman*, 362 F.3d 227, 240 (4th Cir. 2004).[6] This conflict, involving a recurring issue of great importance, warrants review by this Court.

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[5] Respondents do cite *V-1 Oil Co.* v. *Utah State Dept. of Pub. Safety*, 131 F.3d 1415, 1425 (10th Cir. 1997), as endorsing the Second Circuit's approach. Br. in Opp. 18. But they misread *V-1 Oil*. Although the Tenth Circuit quoted a snippet from a Second Circuit decision for the proposition that "[t]he incidental burdens of the *Pike* inquiry 'are burdens on interstate commerce that exceed the burdens on intrastate commerce'" (131 F.3d at 1425 (citation omitted)), it immediately went on to add that "[s]uch incidental burdens might *also*" include such things as "'the disruption of [interstate] travel and shipping due to a lack of uniformity in state laws.'" *Ibid.* (citation omitted). Indeed, although there was no showing of a disparate impact on interstate commerce in *V-1 Oil*, the Tenth Circuit engaged in a lengthy balancing inquiry (see *id.* at 1424-1427) before upholding the challenged law because the burden imposed on interstate commerce was not "'clearly excessive' under *Pike*." *Id.* at 1427 (quoting 397 U.S. at 142).

[6] Respondents dismiss *PSINet* as turning on "an inappropriate extra-territorial effect of a state law." Br. in Opp. 16-17. But that was an alternative holding; the Fourth Circuit also expressly held that, even if the challenged state law were construed to reach only in-state activity, it would be invalid "because the burdens it imposes on interstate commerce are excessive in relation to the local bene-

2. Respondents also are incorrect in arguing that the Fifth Circuit's analysis is consistent with this Court's decisions. As we showed in the petition (at 15-17), this Court never has indicated that a finding of disparate impact on interstate commerce is an element of the *Pike* analysis; respondents are unable to cite any decision of this Court standing for such a proposition.[7] Indeed, as we also noted in the petition (at 16-17), Justice O'Connor concluded that the flow control ordinance challenged in *C & A Carbone, Inc.* v. *Town*

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fits it confers." 362 F.3d at 240. Respondents similarly assert that *McNeilus Truck & Manufacturing, Inc.* v. *Ohio*, 226 F.3d 429 (6th Cir. 2000), is inapposite because the Sixth Circuit there "found little or no legitimate local benefit from local regulation." Br. in Opp. 17. But that observation would seem to prove our point: the Sixth Circuit held that, even if a state law is nondiscriminatory, it will be struck down when "the burden it imposes is 'clearly excessive in relation to the putative local benefits.'" 226 F.3d at 444 (quoting *Pike*, 397 U.S. at 142).

[7] *Minnesota* v. *Clover Leaf Creamery*, 449 U.S. 456 (1981), which is cited by respondents at Br. in Opp. 16, supports our understanding of *Pike*. The Court there explained that, "[e]ven if a statute regulates 'evenhandedly,' and imposes only 'incidental' burdens on interstate commerce, the courts must nevertheless strike it down if 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" 449 U.S. at 471 (quoting *Pike*, 397 U.S. at 142). After observing that the challenged Minnesota law "does not discriminate between interstate and intrastate commerce," the Court applied the *Pike* balancing test, upholding the law because "the burden imposed on interstate commerce is relatively minor" and the "local benefits ample." *Id.* at 472-473. In the course of this analysis, the Court observed that, given the substantiality of the state interest, the law would be upheld even if it were assumed that out-of-state industry "is burdened relatively more heavily" than in-state business. *Id.* at 473. But the Court plainly did not regard such a finding of disparate impact to be a prerequisite to application of the *Pike* test.